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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1109
DONALD F. MOORE,
Petitioner,
vs.
THE UNITED STATES OF AMERICA

No. 1110
JOHN E. LINDH,
Petitioner,
vs.
THE UNITED STATES OF AMERICA

No. 1111
JAMES J. FITZPATRICK,
Petitioner,
vs.
THE UNITED STATES OF AMERICA

No. 1112
ERNEST F. WILLARD,
Petitioner,
vs.
THE UNITED STATES OF AMERICA

No. 1113
CLARENCE W. CANDLIN,
Petitioner,
vs.
THE UNITED STATES OF AMERICA

No. 1114
LEONARD B. CRUSER,
Petitioner,
vs.
THE UNITED STATES OF AMERICA

No. 1115
WALTER H. MADDAMS,
Petitioner,
vs.
THE UNITED STATES OF AMERICA

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

DANIEL O. HASTINGS,
WILLIAM A. GRAY,
HOMER CUMMINGS,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

Nos. 1109-1115

DONALD F. MOORE, JOHN E. LINDH, JAMES J. FITZPATRICK, ERNEST F. WILLARD, CLARENCE W. CANDLIN, LEONARD B. CRUSER AND WALTER H. MADDAMS,

vs. *Petitioners,*

UNITED STATES OF AMERICA

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Your petitioners, Donald F. Moore, John E. Lindh, James J. Fitzpatrick, Ernest F. Willard, Clarence W. Candlin, Leonard B. Cruser, and Walter H. Maddams, pray that writs of certiorari be issued to review the judgments of the United States Circuit Court of Appeals for the Third Circuit, entered in the above cause on December 1, 1944, affirming the judgments of the United States District Court for the District of Delaware.

Opinions Below

The opinion of the District Court denying motion for directed verdict (A. 227a),[1] is not officially reported. The opinion of the Circuit Court of Appeals (SA. 185-198) is not yet officially reported.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered on December 1, 1944 (SA. 198-205). The petitioners timely filed a petition for rehearing (SA. 207-226). The Circuit Court of Appeals on January 26, 1945 (SA 227), and on February 24, 1945 (SA. 227-228), entered orders amending its opinion. Order denying petition for rehearing was entered February 28, 1945 (SA 229). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

Questions Presented

1. Whether the evidence is sufficient as a matter of law to sustain a conviction for conspiracy to violate the mail fraud statute and Section 17(a) of the Securities Act of 1933 by use of the mails in furtherance of a scheme to defraud and by employment of the same fraudulent scheme in the sale of securities by mail and by other means of interstate communication where the evidence shows merely close association with alleged conspirators and fails to show knowledge by the defendants of the illegal objects of the conspiracy and is equally consistent with an hypothesis of innocence as of guilt.

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[1] References herein are to:
"A.—" Petitioners' Appendix
"SA.—" Petitioners' Supplemental Appendix
"GA.—" Government's Appendix
"R.—" The stenographic transcript.

2. Whether a conviction on a single count for conspiracy to violate Section 17(a) of the Securities Act of 1933 and as well to violate the mail fraud statute can be sustained where the only evidence to show purpose to violate such statutes shows that the only use of the mails or any means of interstate communication by or on behalf of any of the alleged co-conspirators—a report by the vendor's agent to the vendor of the fact of the sale of the alleged security—occurred subsequent to the completion of the sale of the alleged security, involved no solicitation of, or communication to, the purchaser, and was not for the purpose of lulling the purchaser, or concealing the sale, and fails utterly to show that the use of the mails or interstate means of communication was in any way in furtherance of the sale.

3. Whether, when the evidence relied upon by the Government to establish the sale of "a security" in a prosecution for conspiracy to violate Section 17(a) of the Securities Act of 1933 and the mail fraud statute consists not only of a document but as well of testimony as to alleged oral representations at the time of its transfer, the question as to the sufficiency of the evidence to establish the sale of "a security" within the statutory meaning of that term may be determined by the Court as a matter of law and withdrawn from the jury, or is properly to be submitted to the jury under instructions as to the applicable law.

4. Whether admissions by co-defendants as to essential elements of the crime charged made by such co-defendants to an investigating agent of the United States Bureau of Internal Revenue, and procured and induced as a direct result of his promise not to cooperate with a pending SEC investigation, are as a matter of law within the privilege against self-incrimination under the Fifth Amendment and as well incompetent and inadmissible as against petitioners.

5. Whether, where in an indictment for conspiracy to violate the mail fraud statute and Section 17(a) of the Securities Act of 1933, there is alleged a single scheme to defraud by organizing a club so that the defendants could fraudulently obtain money from persons joining the club, and where the case is tried on the theory that the club was set up to carry out the scheme to defraud and that but a single scheme is involved—Whether the evidence is sufficient as a matter of law to sustain conviction on the indictment where a finding of fraudulent purpose on the part of any of the defendants at the time of the organization of the club (in 1928) can be made only by the violent assumption that, from actions of some of the defendants (in 1934, a year after the club was reorganized for expansion) allegedly evidencing their fraudulent intent immediately prior thereto, it may be retrospectively inferred that such fraudulent purpose and intent existed at the time the club was formed more than five years earlier.

Statutes Involved

The Act of May 4, 1909, c. 321, sec. 215, 35 Stat. 730 (18 U. S. C. sec. 338) provides:

> Whoever having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any post office * * * to be sent or delivered by the post office establishment of the United States, or shall take or receive * * * therefrom, any such letter * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

The Securities Act of 1933, May 27, 1933, c. 38, Tit. I, 48 Stat. 84 (15 U. S. C. sec. 77) provides:

> Sec. 17(a). It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—(1) to employ any device, scheme, or artifice to defraud * * *. (15 U. S. C. sec. 77q(a))
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> * * * * * * *
>
> Sec. 24. Any person who willfully violates any of the provisions of this subchapter * * * shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both. (15 U. S. C. sec. 77x)

Section 37 of the Criminal Code (18 U. S. C. sec. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Statement

Petitioners were named as defendants in an indictment in a single count returned September 22, 1942 and charging them with conspiracy with each other and with others who were not indicted but were referred to as co-conspirators to violate the mail fraud statute and the fraud provisions of Section 17 of the Securities Act of 1933 (A. 96a-106a) all in violation of 18 U. S. C. sec. 88. The case was consolidated for trial with the case of *United States* v. *Monjar, et al.*, involving the indictment under which were

tried the petitioners in the companion petition for certiorari *Monjar* v. *United States*, Nos. 1104-1108 (A. 2a).

There was a verdict of guilty as to all the petitioners with a recommendation of mercy. Maddams was sentenced to six months imprisonment and a fine of $500; Moore, Fitzpatrick, Cruser and Candlin were sentenced to one year and one day and a fine of $1000 each; Lindh and Willard were sentenced to eighteen months imprisonment and a fine of $1500 each. All the defendants were placed on probation for two years (A. 11a-14a). Appeals from the convictions under the two indictments were heard and considered together. The Circuit Court of Appeals affirmed (SA. 198-201) and denied petition for rehearing (SA. 229).

The indictment.—The indictment in this case, returned September 22, 1942, alleged that the defendants and others[2] had conspired with each other and with the petitioners in No. —, *Monjar* v. *United States*,[3] to violate the mail fraud statute (18 U. S. C., Sec. 338 and the Securities Act of 1933, Sec. 17 (a), 15 U. S. C., Sec. 77 q(a). The scheme alleged was, with the addition of nine paragraphs, identical with that alleged in count 1 of the indictment in the *Monjar* case, *supra* (A. 96a, 99a, 20a-42a). The substance of the 51 paragraphs of count 1 of the Monjar indictment is fully set forth in the Petition for Certiorari in Nos. 1104-1108 and need not here be repeated. In substance the nine paragraphs thus added alleged that on or about the time Monjar and others were indicted in May, 1942, the defendants assisted Monjar in setting up a declaration of trust in which two of the defendants, Candlin and Mad-

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[2] Of five others named as defendants in the indictment, there was a severance as to one in the Armed Service (GA. 2), a nolle pros as to one because of illness (A. 7a) and three were acquitted (A. 8a).

[3] The petitioners in the *Monjar* case were not included in this indictment but were named as co-conspirators (A. 98a).

dams, and Cook, were made trustees; that they employed agents for the stated purpose of liquidating loans made to Monjar; that they approached persons who had made the loans to make contributions of the amount of their loans; and that the agents were instructed to promise that the contributions would be returned. A part of the alleged scheme was that the defendants would cause the agents to give to those solicited a summary of the charges made against Monjar and his associates which would not be true and accurate; and that the agents were caused by the defendants to omit to state that the money loaned had been dissipated.

Observation of counsel.—A hindsight view of all the testimony introduced by the Government suggests now that it would probably have been advantageous to the defendants in the second indictment to have had separate counsel.

The evidence.—The evidence adduced by the Government in proof of the allegations contained in the first 51 paragraphs of the Monjar indictment has been stated in the companion Monjar petition insofar as that evidence related to the activities of the defendants named in that indictment. Insofar as the statements contained in the companion petition described the organization of the Mantle Club, the Key Publishing Company, the Golden Braid Costume Company, the American Business Management Corporation, the American Business Research Corporation, the American Distributing Corporation, and the Independence Club of America and the operation of those entities, the general framework of the alleged scheme has been adequately described.

The principal ground of this petition rests upon the contention that the Government failed to prove under applicable law that the individual defendants herein named participated in a conspiracy to defraud. It is for this rea-

son that this statement of facts is limited to a summary of all the evidence as to the relationship and connection of the seven defendants with the general scheme set in motion by the defendants named in the Monjar indictment.

The seven individuals herein concededly participated by way of affirmative action in the organization and conduct of the activities of the Mantle Club, the Key Publishing Company, and to a lesser extent of the Golden Braid Costume Company.

The greater portion of the evidence on which the Government relied to connect these defendants with the main conspiracy is to be found in the affidavits submitted by them in support of their application for a Bill of Particulars, and subsequently put in evidence by the Government (GA 1517a-1637a, 949a). From these it appears that all of these defendants joined the Mantle Club at various dates between 1929 and 1932, were original members of the Mantle Club under its revised charter of 1933, and had been employed by the National Board of Governors of the Club in varying capacities at salaries ranging from $25 per month for part-time work up to $4,000 a year. Two were employed by other entities for short periods: Lindh was paid for tax and accounting work as active manager of the American Business Management Corporation, and Candlin who was employed as treasurer of the Key Publishing Company.

All acquired from 10 to 20 shares of the stock of the Key Publishing Company either by original subscription or by subsequent acquisitions at the original issue price. For a short period after the formation of that Company, most of the defendants sold Key Magazines on a commission basis. They had no official position with the Company with the exception of Fitzpatrick who was an editorial contributor (GA 1556a) and Candlin who became treasurer in 1941 at

a salary of $328 per month. From and after 1940 when these defendants (with the exception of Maddams) became members of the National Board of Governors of the Mantle Club, they participated in the purchase of Key Magazines from the Key Publishing Company. During this period the Mantle Club purchased 10,641 issues of the Key Magazine and sold 34,466 back issues from its inventory. Over the course of years that they held the stock of Key Publishing Company defendants, respectively, received total dividends ranging from $186 to $1540. In large amount, these dividends were loaned to Monjar (GA 1662a-1663a).

The defendants had no knowledge or information concerning the Golden Braid Costume Company other than that it produced costumes for the Mantle Club. The direct evidence indicates they did not learn the identity of its stockholders until after the purchase of costumes by the Mantle Club had been discontinued (GA 1535a, 1549a, 1559a, 1620a, 1633a), although the defendants Lindh and Candlin, since they assisted in the bookkeeping and tax work of the Company, possibly acquired some knowledge of the stockholders. However, as members of the National Board of Governors of the Mantle Club the defendants in 1940 and 1941 did authorize the purchase of costumes in number beyond the immediate needs of the club but based upon prior authorizations by the Mantle Club council, the governing body established for the Club in 1940 (A. 390a-394a). Each defendant stated that the purchases were made in the exercise of their business judgment in the light of the then known rate of growth of the club, its membership goal of 100,000 members, and having regard for anticipated scarcity of materials and the reasonable price for which the garments could then be obtained.

Except for a general knowledge of the purported objectives of the other corporations named in the indictment,

none of the defendants had any connection with them except that some had been induced to purchase stock in them.

The proof shows that these defendants themselves loaned money to Monjar prior to the inception of the organized loan solicitations described in the companion indictment and thereafter, but not as participants in any organized PL or CD meetings. The totals of these by the several defendants ranged in amount from $780 to $2,900. None of these defendants were ever present at a personal loan meeting at which loans were solicited and representations made of the character alleged in the indictment (A. 352a-364a). The affirmative evidence shows that these individuals had no knowledge of the manner in which Monjar expended the loan proceeds (A. 352a-365a, GA 1507a, 1673a, Q and A No. 22, GA 178a-179a, R. 6804-6805). It was not until after the investigation of the Mantle Club activities in Pittsburgh in December, 1941, and in Wilmington in January, 1942, that any information whatever was disclosed to these defendants as to the size of the personal loan account. In January, 1942, subsequent to the investigations, approximately 4,500 affidavits from personal loan subscribers were exhibited to these defendants (R. 6367-6374, A 314a, 279a, SA. 62). These affidavits (Def. Ex. 71) stated that the lenders did not expect any payment except the principal amount of the loan, that they were not obtained by pressure and that they were in no sense in the nature of investments. By action of the principal defendants the loans were discontinued in February, 1942, and about the same time the defendants here together with a number of the other associates of Monjar offered in writing to assist Monjar by cancelling their own loans (Def. Ex. 21, SA. 158). Thereafter, upon the advice of tax counsel for the Club [4] the tendered cancellation of indebtedness was rejected and to avoid income tax liability

[4] Tax counsel for the Club, Paul F. Meyers, of Washington, D. C. (R. 7617-7619).

the liquidation of the loans was placed on a contribution basis (SA 66). Accordingly, on May 21 (A. 173a) five days before the indictment was returned a liquidating trust was established in which defendants Maddams and Candlin were associated as trustees with A. J. Cook, named as a defendant in the Monjar indictment. All the defendants herein donated to the liquidating trustees amounts equal to their loans together with their stock in the Key Publishing Company which had been purchased with their own funds (GA. 1529, 1540, 1553, 1563, 1577, 1626, 1637, 1591a-1595a, 1626, 1637). No testimony connected any of these defendants with the solicitation of the contributions in accordance with the terms of the liquidating trust except Candlin and Maddams who as trustees and in their affidavits acknowledged that they gave written instructions for the solicitation of contributions on behalf of Monjar (GA. 1574a-1577a, 1623a-1626a).

These instructions and all of the documents concerning the liquidation appear at GA. 1578a-1614a.

By September 16, 1942, about $800,000 in contributions had been received by the trustees (A. 380a, 315a).

The defendants, Candlin and Maddams, justified their actions in participating in the liquidating trust on the ground that they relied upon the affidavits exhibited to them and had no knowledge or belief that the loans had been improperly obtained (A. 314a) and based upon their own complete confidence in Monjar (A. 297a-302a) and upon the theory that they did not believe anything improper had been done, but that if the facts alleged in the indictment were true they assumed that no person would make any contribution of his funds upon being advised that Monjar had been indicted therefor (A. 312a-313a). The Trustees did instruct their agents to inform every person from whom contributions were solicited that two indictments were pending, one by state authorities in Pennsylvania and the other by the United States in Wilmington and that said

indictmants charged fraud (GA. 1575a-1577a-1608a-1612a).

There is no evidence in the record which would charge any of the defendants with knowledge of any false statement or promise made in connection with the solicitation of the loans, or made in connection with the solicitation, of contributions to the Trustees for Monjar's benefit.[5]

Not a single one of these defendants received or retained any personal loan funds whatever (GA. 1797a-1803a). Their sole income came from salary from the Club or in single instances the Publishing Company or the Management Corporation.

Specification of Errors to Be Urged

The Circuit Court of Appeals for the Third Circuit erred in holding:

1. That there was evidence sufficient to sustain the verdict of guilty against petitioner for conspiracy to violate Section 17(a) of the Securities Act and the mail fraud statute.

2. That use of the mails after completion of the sale of a security is a use of the mails "in the sale" of a security within the meaning of Section 17(a) of the Securities Act of 1933.

3. In failing to hold that a verdict of guilty of conspiracy to violate Section 17(a) of the Securities Act of 1933 and the mail fraud statute must be set aside where there is no evidence that the provisions of the Securities Act would be violated by the purpose of the conspiracy or the means of accomplishing it.

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[5] The Government produced two witnesses out of 5,000 loan subscribers on the subject of contributions to the Trustees. One retracted his testimony on cross-examination (SA. 34 R. 4298); another testified that the defendant Clark made false statements to him (SA. 24), but Clark was acquitted by the Jury (A. 759a). Neither of these witneses mentioned any convicted defendant in his testimony, nor was any other testimony adduced to connect the defendants here with the individuals who were stated to have made the representations.

4. In failing to hold that the trial court erred in directing the jury that as a matter of law, the personal loan transactions constitute a sale of securities as the terms "sale" and "security" are defined in the Securities Act of 1933.

5. In holding that confessions by petitioners' co-defendants induced and influenced by promises of non-cooperation with the SEC by the Internal Revenue Agent to whom they were made are not thereby rendered incompetent under the Fifth Amendment and as well incompetent and inadmissible against petitioner.

6. In holding that after indictment, trial and verdict of guilty for conspiracy to violate the mail fraud statute and on instructions all limited to allegation and proof of a scheme to defraud by the formation of a club, conviction may, in the absence of evidence of such scheme, nevertheless, be sustained so long as some scheme is shown to have existed at the date of the use of the mails.

7. In holding that evidence of acts in 1934 from which fraudulent intent of defendants in that year were inferred permits of the further and retrospective inference that defendants had such fraudulent purpose at a time five and even seven to ten years earlier.

Reasons for Granting the Writs

1. **There was no evidence sufficient to connect the seven defendants in this indictment with the alleged conspiracy.**— The defendants here rely primarily on two established legal principles: First, proof of participation in a conspiracy is not established by mere evidence of the doing of a series of acts that further the conspiracy; and, second, when circumstantial evidence only is adduced, conviction for conspiracy cannot be sustained unless there is affirmative proof to establish, to the exclusion of every other reasonable hypothesis, that the defendants had knowledge of the illegal

objects of the alleged conspiracy. *United States* v. *Falcone*, 311 U. S. 205, 211; *Direct Sales Company* v. *United States*, 319 U. S. 703, 711.

The Government made no effort during the course of the trial to charge the defendants herein with knowledge of the illegal objects of the conspiracy other than by offering in evidence a letter from the Minneapolis Board of Governors transmitted under date May 28, 1942 (Gov. Ex. 280, GA. 1759a). This was offered specifically, and received, on the theory that it placed the defendants upon notice of the charges being made against the principal defendants in the *Monjar* case. However, it was mailed, and necessarily received, subsequent to the return of the first indictment May 26, 1942, and added little or nothing to the charges of that indictment. It was admittedly based on hearsay declarations twice removed.

The evidence establishes conclusively that each of these defendants had a blind faith in Monjar's ability and good intentions (A. 277a-279a—Lindh; A. 297a—Maddams; A. 313a—Candlin; GA. 1723a—Willard; A. 264a—Cruser). This faith was predicated upon thousands of letters directed to the club and to the publishing company stating the benefits received by members from their partipation in club activities and from reading the Key Magazine (Defs. Exs. 74 and 75). Actions explainable by reliance upon another's apparently good intentions are not sufficient to prove participation in a conspiracy. And up to now, the relatively rare quality of true loyalty and steadfast adherence to an idolized leader has not been deemed a basis for criminal prosecution. As pointed out in *United States* v. *Wise*, 108 F. 2d 379, 382 (C. C. A. 7):

> "it is nevertheless often true that eligibility to appropriate guardianship proceedings is not sufficient to establish participation in a crime where evil intent is an essential element. *Particularly is the above true*

when the apparent stupidity arises from faith in a friend, placing trust in one whom subsequent events prove unworthy of trust.'' (Emphasis supplied.)

Here the evidence is uncontested that there was a close association between these defendants. There was almost daily contact with the Defendants Cook and Jones and somewhat less frequent contact with Monjar and Drew. But close association does not suffice as a ground upon which to sustain conviction of participation in a conspiracy. *Weniger* v. *United States,* 47 F. 2d 692 (C. C. A. 9); *Mazurousky* v. *United States,* 100 F. 2d 958, 961 (C. C. A. 9); *United States* v. *Koch,* 113 F. 2d 982, 983 (C. C. A. 2); *Tingle* v. *United States,* 38 F. 2d 573, 575 (C. C. A. 8); *Linde* v. *United States,* 13 F. 2d 59, 61 (C. C. A. 8); *Copeland* v. *United States,* 90 F. ed. 78 (C. C. A. 5); *Goodman* v. *United States,* 128 F. 2d 854, 856 (C. C. A. 9); *Lee* v. *United States,* 106 F. 2d 906 (C. C. A. 9).

With respect to the Key transactions there is no evidence of participation with knowledge in acts tending to show an unlawful aim. With respect to the costume transactions, the hypothesis of innocence: that the purchases were made in the exercise of a reasonable and honest business judgment, is well founded in the evidence and fortified by the absence of any motive of personal gain. Certainly, it cannot reasonably be suggested that the purchase of quantities of merchandise in excess of the present needs of any club or business of itself involves an hypothesis of guilty participation so strong as to exclude any theory of innocent error and to ''point not to the possibility or probability, but the moral certainty of guilt''. *Kassin* v. *United States,* 87 F. 2d 183 (C. C. A. 5).

The thousands of letters referred to, the exhibit showing the results of an unsigned questionnaire submitted to substantially all the members of the club (A. 625a) the con-

tinual evidence of work well done (e. g. A. 628a-672a, A. 316a-344a) establishes again the most reasonable hypothesis to be that, in receiving the allegedly "large sums of money by way of salary and expenses" the defendants acted in good faith without knowledge of an unlawful purpose in the operation of the Mantle Club.

With respect to the loans, there is not only lack of evidence of knowledge as to the unlawful objects of the conspiracy to obtain them, but as well, a failure of proof that these defendants were ever present and heard, or ever had reported to them, the false statements and extravagant promises allegedly made in connection with the solicitation of the personal loans. As pointed out above, the evidence shows that these defendants were, equally with the others, the victims of a very poor loan arrangement with Monjar. Here the defendants furnished their services which furthered the conspiracy to an organization which admittedly accomplished a tremendous amount of good for its members.[6] All of the evidence adduced at the trial with the exception of that pertaining to the personal loans was but circumstantial evidence of the existence of a scheme to defraud. As such, that evidence had to carry the greater burden of excluding any reasonable inference of good faith. If the circumstances proved with respect to the club, magazine, costumes and corporations leave open the hypothesis that these defendants acted in good faith, then the convictions must be reversed. *McLaughlin* v. *United States*, 26 F. 2d 1; *Turinetti* v. *United States*, 2 F. 2d 15; *Yusem* v. *United States*, 8 F. 2d 6; *McDonald* v. *United States*, 9 F. 2d 506; *Graceffo* v. *United States*, 46 F. 2d 853.

The law is rather clear on the subject. This court has recently twice delineated the proof essential to conviction

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[6] A condition of probation for the paroled defendants fixed by the courts was that they need not surrender their membership in the Mantle Club.

for participation in criminal conspiracy. As pointed out in *Direct Sales Company* v. *United States*, 319 U. S. 703, 711:

> "Without the knowledge, the intent cannot exist. United States v. Falcone, 311 U. S. 205. Furthermore, to establish the intent, *the evidence of knowledge must be clear;* not equivocal. Ibid. This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes." (Emphasis supplied.)

Here again the dragnet has been invoked to convict sincere men who happened merely to have the misfortune to possess the virtue of faith in another. It may be confidently predicted that, successful as it was in the court below in submerging these defendants under the vast mass of documents and testimony accumulated by industrious investigators and counsel, the Government will not now even attempt to set out or analyze the specific evidence upon which it relies as demonstrating the guilt of each of these petitioners.

2. **The erroneous construction of the Securities Act by the court below involves a recurring and highly important question of Federal law which should be decided by this Court.**—The argument in support of this point is set out in full in Point 1 of the Petition for Certiorari in the *Monjar* case (Nos. 1104-1108) and is adopted by reference here. It is plain that the only evidence introduced to show that the single conspiracy count in this indictment contemplated acts in violation of Section 17 of the Securities Act consisted of the acts proved by the Government and by it relied upon to sustain convictions on the substantive counts for violation of the same section. But as is fully developed in Point I of the *Monjar* petition, the Circuit Court of Appeals erred in holding that the acts of defendants are violations of Section 17 of the Securities Act and it, therefore, necessarily results that there was no evidence

upon which a jury could rightly find the existence of a conspiracy to violate Section 17 of the Securities Act, as alleged in this indictment.

The defendants' motion to withdraw from the jury all consideration of the evidence offered to sustain the allegation that the defendants conspired to violate Section 77q (a) of Title 15, U. S. C. (A. 686a) was overruled and exception noted (A. 750a). Error was properly assigned (A. 784a).

For the reasons stated in the *Monjar* petition, Nos. 1104-1108 (pp. 30-32) and under the decision of the Circuit Court of Appeals there cited, since the jury was, over objection, permitted to consider together defendants' guilt in respect to frauds under the Securities Act as well as under the mail fraud statute, the verdict must be set aside. *United States* v. *Groves*, 122 F. 2d 87, 91 (C. C. A. 2); *United States* v. *Smith*, 112 F. 2d 83, 86.

3. **The trial court plainly invaded the province of the jury and deprived petitioners of their right to a jury trial in instructing as a matter of law that the personal loans constituted sale of securities within the meaning of the Securities Act.**—The decision of the court below is in plain conflict with the decision of this Court in *Securities and Exchange Commission* v. *Joiner Corp.*, 320 U. S. 344, 355. This Court there held that where the proof that documents sold were "securities" within the meaning of the Act requires going outside the instrument itself to show the character given it by the terms of the offer and by the economic inducements, then such proof, in a criminal case, is subject to the "requirement of satisfying the jury beyond a reasonable doubt." The argument in support of this point is set out in full in Point 2 of the Petition for Certiorari in *Monjar* v. *United States*, Nos. 1104-1108, pp. 33-35, and is adopted by reference here.

4. **The decision of the court below holding admissible the confessions induced by promises of an internal revenue agent and given by the defendants indicted in the Monjar case is in conflict with decisions of this Court.**—The argument in support of this point is set out in full in Point 3 of the Petition for Certiorari in *Monjar* v. *United States*, Nos. 1104-1108, pp. 35-41, and is adopted by reference.

It is to be noted that these confessions were admitted in evidence generally without limiting the jury to consideration thereof only as against the defendants who respectively made them (R. 5028). The confessions were properly to be barred, not only because of the constitutional inhibition against self-crimination, but also because of the inherent probability or possibility that a confession given as the result of threats or inducing promises is false.

There can be no serious question that the evidence thus erroneously admitted was highly prejudicial to petitioners. The statements given to Internal Revenue Agent Cordes (Gov't Exs. 255 (GA. 1642a), 256 (GA. 1670a), 275 (GA. 1678a), 258 (GA. 1704a), 259 (GA. 1715a), 260 (GA. 1726a), 261 (GA. 1736a), and 262 (GA. 1742a) all constituted confessions of the truth of some of the essential parts of the guilty facts charged in the indictment and hence tended to show as against petitioners that at least there was in existence a fraudulent scheme constituting an element of the substantive crimes petitioners were charged with conspiring to commit.

The error of the Circuit Court of Appeals in sustaining the action of the district court in admitting these confessions requires reversal of the judgments against petitioners.

5. **The evidence was insufficient as a matter of law to show the existence of the scheme charged in the indictment and constituting the basic theory on which the case was tried and submitted to the jury.**—The errors of the court

in sustaining the sufficiency of the evidence to support the verdict on the grounds either: (1) that it was not necessary to prove the fraudulent scheme for which petitioners were indicted, and on which under the avowed theory of the Government they were tried and, by specific instructions to the jury, convicted; or (2) that from evidence allegedly tending to show a fraudulent scheme after the expansion of the Mantle Club in 1933 there may be retrospectively inferred a fraudulent intent and scheme in its formation in 1929, are pointed out in the argument under Point 4 in the Petition for Certiorari in *Monjar* v. *United States,* Nos. 1104-1108, pp. 41-53. That argument is here adopted by reference.

Essentially the same scheme there alleged was here alleged at the scheme constituting that essential element of the substantive offenses petitioners are charged with conspiring to commit. The errors are equally prejudicial to them.

Conclusion

It is respectfully submitted that for the above stated reasons the petition for writs of certiorari should be granted.

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